

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
)	
Request for Review by CRITICAL ALERT)	WC Docket No. 06-122
SYSTEMS, LLC f/k/a NEP, LLC of Decision of)	CC Docket No. 96-45
Universal Service Administrator)	CC Docket No. 97-21
)	

To: The Secretary, Federal Communications Commission

Attn: Wireline Competition Bureau

APPEAL FROM USAC FINDINGS AND CONCLUSIONS

CRITICAL ALERT SYSTEMS, LLC (CAS), assignee of and successor-in-interest to NEP, LLC (NEP), by its attorney and pursuant to Sections 54.719(c), 54.721 and 54.722 of the Commission's rules, hereby appeals the findings and conclusions of the Universal Service Administrative Company (USAC) in Audit No. CR2011CP008, insofar as such findings and conclusions reject, as inadequately supported, the allocation [REDACTED] NEP's telecommunications revenues to the interstate jurisdiction during calendar year 2009, and instead conclude that a contribution [REDACTED] should have been made to the Universal Service Fund (USF) during 2009 on the basis of a "safe harbor" interstate allocation of 12% of NEP's telecommunications revenues.¹ CAS respectfully submits that USAC's refusal to credit the evidence proffered and provided by CAS in support of the [REDACTED] is arbitrary, unreasonable and unlawful,

¹ USAC's final audit report was transmitted to CAS by letter dated May 4, 2012; copies of the letter and report are attached as Exhibit No. 1. Subsequently, by letter dated May 22, 2012, USAC requested that CAS modify the 2010 Form 499-A report to conform to its audit findings and conclusions. A copy of USAC's letter is attached as Exhibit No. 2. To the extent necessary, CAS also appeals the directive contained in USAC's May 22d letter requesting CAS to modify the 2010 Form 499-A report. In CAS' view, the instant appeal should toll the running of the 60-day period for amending the 2010 Form 499-A report; and in any event CAS does not intend to take any action in response to the audit findings and conclusions until its appeal has been resolved.

and accordingly should be reversed; and CAS further requests that USAC's finding that NEP should have made any USF contribution for 2009 be rescinded.

In support of its appeal, CAS respectfully states:

Introduction and Background

In Audit No. CR2011CP008, USAC's staff performed an audit, said to be randomly selected, of the 2010 Form 499-A reported telecommunications revenues and USF contribution base originally filed by NEP, LLC covering calendar year 2009. Subsequent to the filing of its Form 499-A Report, NEP's business and operations were acquired by CAS, effective July 30, 2010.² Accordingly, USAC's audit actually was performed on CAS for the Form 499-A report filed by NEP covering calendar year 2009.

As part of its audit, USAC sent an extensive request for information, to which CAS responded on July 22, 2011; and USAC requested supplemental information after reviewing CAS' responses, to which CAS responded in relevant part on August 8, 2011 and on August 15, 2011.³ In addition to sending CAS detailed document and information requests, USAC conducted a site visit for four days during August 22-25, 2011 at CAS' headquarters in Westbrook, ME. Subsequent to the site visit, CAS and USAC continued their dialogue, primarily addressing NEP's interstate allocation, in a string of email messages from September 6, 2011 through December 19, 2011.⁴

During the site visit CAS' Chief Operating Officer and other senior officials met repeatedly with USAC's staff to, among other things, explain the nature of the one-way wireless mes-

² See Form 603 application proceedings in ULS File No. 0004242684 and consummation notice in ULS File No. 0004359989.

³ A copy of the transmittal detailing the information provided by CAS in response to USAC's initial information request is attached as Exhibit No. 3, together with a copy of CAS' Supplemental Information concerning USAC's Item 13, addressing the interstate revenues allocation. Copies of CAS' further responses on August 8 and August 15, 2011 are attached as Exhibit No. 4.

⁴ Copies of the email messages in this string are attached as Exhibit No. 5.

saging service provided by the company to its customers. In particular, CAS explained that its customer base is overwhelmingly centered in the health care industry and in first and second responders, and other entities where a rapid response is required in order for the service to have any meaningful utility. CAS further explained that, as a result, its messaging service inherently is a local service, *i.e.*, that the persons receiving the messages must be located either on the campus of the institution sending the message or in very close proximity to the sender of the emergency message, so that a response to the message can be made on a timely basis.⁵

CAS further explained that its customer contracts typically require [REDACTED]

originated.⁶ CAS emphasized that the technical architecture of its network does not derogate from the emergency, inherently local character of the service it provides to its customers.

CAS also explained that, as USAC's regulations themselves recognize, the exact location of the recipient is not known when he or she receives the message transmitted by CAS, and, therefore, it is physically impossible to conduct a traditional traffic study of actual usage to verify the percentage of telecommunications revenues allocated to the interstate jurisdiction.⁷ CAS provided detailed breakdowns of its customer base to demonstrate the emergency alerting character of the messaging service it provides; and it proffered not only the statements of its officers

⁵ [REDACTED]

This information was provided to USAC in Exhibit B, Item 13 of CAS' initial response on July 22, 2011 to USAC's information request.

⁶ CAS, and NEP previously, provides its emergency messaging services in six different New England states (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut), and uses a domestic satellite control channel to deliver customer messages to its base stations for retransmission to the customer devices. CAS, and NEP previously, also operates terminals in each LATA it serves, through which the messages originated in that LATA are routed to CAS' wireless network for transmission to customers.

⁷ CAS/NEP charges a unitary service rate for its messaging service that is not broken out by jurisdiction.

and employees, who are expert in its services and applications, but also offered to allow USAC to talk to customer representatives so that USAC could determine for itself the way customers use CAS services, in order to verify that the interstate allocation is correct.

While USAC initially professed to understand that it is physically impossible to conduct a traffic study to validate CAS' interstate allocation, and while it professed that it would "gladly review any additional information [CAS/NEP] provides to support the reported jurisdiction", it steadfastly refused to provide CAS any meaningful guidance as to what type of information would suffice.⁸ All the while, USAC nonetheless continued to insist that CAS/NEP could provide "a report demonstrating origination and termination of paging traffic",⁹ *i.e.*, a traditional traffic report of usage. USAC insisted that any documentation provided by CAS "must be based on actual usage data" (*id.*), but USAC never troubled to explain how "actual usage data" could possibly be collected, since the exact location of the person receiving a CAS/NEP message is not known. Although CAS repeatedly pointed out this gap in logic to USAC, USAC continued to demur on the grounds that "NEP is in a better position than USAC" to determine how to support the interstate allocation.¹⁰

Nonetheless, USAC did appear to leave an opening for CAS when USAC suggested that CAS could submit "details of customer usage" to support its interstate allocation. (*Id.*). Therefore, CAS conducted a survey of its customers and submitted the results to USAC on October 31, 2011.¹¹ The survey results [REDACTED]

⁸ See *e.g.*, B Ruffley email dated September 27, 2011. (Exhibit No. 5 at pp. 11).

⁹ *Id.* at p. 10.

¹⁰ *Id.* at p. 11.

¹¹ The tabulated survey results are attached as Exhibit No. 6. See also Exhibit No. 5 at pp. 6-7 (transmitting survey results to USAC).

es were weighted by the amount of traffic generated. (*Id.*). Obviously, the survey reflected customers' characterization of their utilization, rather than actual measurement data (which the customers could not possibly provide). As a result, USAC nit-picked CAS' survey methodology and results and refused to credit the survey in any respect.¹²

Accordingly, USAC's final audit report applied the "safe harbor" allocation of 12% to CAS' calculated telecommunications revenues and concluded that CAS is liable for a 2009 USF contribution [REDACTED] rather than falling under the *de minimis* exemption for that year.¹³ This appeal followed.

The Commission's "Safe Harbor" Orders

The central issue presented by this appeal is what evidence a critical messaging or other paging carrier can provide to adequately support a claim of actual usage less than the "safe harbor" allocation of 12% interstate. The Commission has only issued three orders addressing in any respect the reporting of interstate revenues by paging/critical messaging carriers. The first order, in 1998, adopted an "interim" safe harbor of 12%, based upon the reported revenues of paging carriers during 1997.¹⁴ The year 1997 was essentially the zenith of the paging industry, which, at that time, had an estimated 49.8 million subscribers, largely representing the consumer market, and \$5.1 billion in industry revenues.¹⁵ At that time, the top five paging companies accounted for more than 50% of the industry.¹⁶ Notably four of those five companies subsequently declared bankruptcy; and all five have gone out of business or have been acquired by other enti-

¹² See Exhibit No. 5 at pp. 1 – 6.

¹³ USAC found fault with CAS' 2010 Form 499-A report in two other respects, but neither one affected its USF contribution for 2009. Those findings are not at issue in this appeal.

¹⁴ *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 21252, at 21259-21260 & ¶14 (FCC 1998) (the *Interim Safe Harbor Order*).

¹⁵ See, e.g., Third Annual CMRS Competition Report, FCC 98-91, released June 11, 1998, at p. 40 & Figure 5 (FCC 1998), available at <http://wireless.fcc.gov/auctions/data/papersAndStudies/fcc98091.pdf> (last visited June 1, 2012). By contrast, the Managing Director estimates that 2012 annual regulatory fees will be paid for 3.4 million CMRS Messaging units, a reasonable measure of critical messaging/paging units currently in service.

¹⁶ *Id.* at pp. 40-41.

ties.¹⁷ In short, the paging industry of 1997, on which the 12% safe harbor was based, bears scant resemblance to today's paging/critical messaging industry.

It is also important to note that 1997 was approximately the time that AT&T introduced its "one-rate" nationwide pricing plan, which is now universally employed by the mobile telephony industry.¹⁸ This and related practices of and developments in the mobile telephony industry have resulted in that industry capturing the entire "roaming" market for wireless services. That is, while a significant portion of the paging market in 1997 consisted of interstate "roaming" service, that portion of the wireless market has since migrated entirely to the mobile telephony carriers; and paging service industry has evolved back into an entirely local and largely campus-based emergency messaging service.

In adopting the 12% "safe harbor" allocation in its 1998 order, the Commission expressly acknowledged that "the percentage of interstate telecommunications revenues derived from the provision of paging service *may vary according to the amount of local service versus nationwide service that a paging carrier provides.* (*Id.* at ¶14). (Emphasis added). The Commission went on to state, therefore, "with regard to a paging carrier that reports less than 12 percent of their revenues as interstate, *we will consider the amount of local service versus nationwide service that such a carrier provides.*" (*Id.*). (Emphasis added).

The Commission also went on to solicit information on any "simplifying assumptions" paging carriers could employ in determining the percentage of interstate revenues to report. (*Id.* at ¶35). Two possibilities identified by the Commission in this regard were (1) the percentage of customers whose service package includes toll-free number capabilities (*e.g.*, 888-, 800, and 877- numbers), with the assumption that these customers are more likely to receive interstate

¹⁷ According to Table 3, p. C-5, of the Third Annual CMRS Competition Report, the top five paging companies in 1997 by revenue in 1997 were PageNet, MobileMedia, Arch, SkyTel and AirTouch.

¹⁸ See generally, *e.g.*, *Interim Safe Harbor Order* at ¶13 & n. 26.

pages”; and (2) “distinguishing between the paging revenues derived from its customers who subscribe to local service and those who subscribe to nationwide service,” with the assumption that “nationwide customers generate more interstate traffic than local customers” (*Id.*).

The second order, in 2002, increased the safe harbor allocation for mobile telephony but declined to change it for paging service.¹⁹ In declining to reduce the paging safe harbor the Commission specifically observed that the American Association of Paging Carriers, which requested the reduction, “did not submit traffic studies or other data” to support the request; and the Commission concluded, therefore, that “the record developed at this time does not support adjustment of the safe harbor” for paging carriers. (*Id.* at ¶23). Notably, the Commission simply declined to change the safe harbor in this order; it did not alter its earlier discussion of what evidence it would consider competent and probative for paging carriers reporting an interstate allocation less than the safe harbor of 12%.

The third order also simply declined to reconsider the Commission’s refusal in the *Safe Harbor Modification Order* to reduce the paging safe harbor allocation,²⁰ holding that petitioners “present[] no new facts or arguments that would persuade us that further reconsideration is appropriate.” (*Id.* at ¶6). In so concluding the Commission once again simply declined to reconsider the safe harbor; it did not purport to alter its earlier discussion in 1998 concerning what a paging carrier must do to support an interstate allocation of less than the 12% safe harbor.

Argument

No matter how USAC attempts to bob and weave when challenged, its position in this case reduces to the contention that CAS can validly support its interstate allocation less than the

¹⁹ *Federal-State Joint Board on Universal Service, et al.*, 17 FCC Rcd 24952, 24966 & ¶¶22-23 (FCC 2002) (the *Safe Harbor Modification Order*).

²⁰ *Federal-State Joint Board on Universal Service; Business Service Center, Inc., Mobile Phone of Texas, Inc., and 3 Rivers PCS, Inc.*, 19 FCC Rcd 22305 (FCC 2004).

12% safe harbor *only* by generating traffic studies showing “actual usage data”. Not only is that physically impossible, and therefore a palpably unlawful standard, but it is *not* what the Commission said it would consider when it adopted the interim safe harbor percentage in 1998. What the Commission actually said was that it would “consider the amount of local service versus nationwide service that a paging carrier provides.”²¹ Under these circumstances, CAS’ showing [REDACTED]²²[REDACTED] should have been enough by itself to adequately support NEP’s interstate allocation [REDACTED]. That information alone should have ended the debate with USAC.

Furthermore, USAC’s insistence upon “actual usage data” is flatly inconsistent with the Commission’s willingness in the *Interim Safe Harbor Order* to use “simplifying assumptions” to allocate paging carrier revenues to the interstate jurisdiction. That is, if the Commission intended to require “actual usage data” to support an interstate allocation of less than 12%, it plainly would not have explored using proxies such as percentage of toll-free numbers to allocate revenues to the interstate jurisdiction.

Even assuming *arguendo* that USAC justifiably insisted upon additional support for NEP’s allocation, USAC erred in refusing to hear or consider the testimony of CAS’ officers and employees, or to accept testimony from CAS’ customer representatives, on the character and usage of CAS/NEP’s service. Testimony of witnesses with direct knowledge concerning a subject matter is probably the most basic form of competent and probative evidence available to prove material facts; and USAC’s refusal to consider such evidence was reversible error.

Similarly erroneous is USAC’s refusal to credit the results of the customer survey performed by CAS. The survey documented as concretely as possible the “actual usage” of

²¹ *Interim Safe Harbor Order* at ¶14.

²² See Exhibit No. 3 at p. 3.

CAS/NEP's messaging service; and certainly was far more precise than the "simplifying assumptions" the Commission postulated in 1998 when it adopted the interim safe harbor allocation. CAS endeavored to make its survey results fully representative of its service and usage, and USAC's criticisms of the survey reflect little more than uninformed speculation.²³

Moreover, USAC's all-or-nothing approach is arbitrary and unreasonable in any event. USAC wholly ignored the fact that the underlying objective of the survey was to verify that NEP qualified for the *de minimis* exemption; and elaborate precision was not necessary to do so. The fact is that the survey results could have been [REDACTED] and NEP *still* would have qualified for the *de minimis* exemption in 2009.²⁴ Accordingly, USAC's utter failure to keep the underlying reason for the survey exercise in context and in perspective is yet another reason why its findings should be rejected.

Finally, CAS points out that Commission decisions must have a rational basis in order to be valid under the Administrative Procedures Act.²⁵ Whatever the merits of the 12% safe harbor allocation in 1998, the critical messaging industry today bears little resemblance to the paging industry at that time, especially with respect to the amount of interstate service provided. CAS recognizes that USAC was not at liberty to disregard the safe harbor during its audit, but the Commission properly may not simply apply the safe harbor to NEP's operations in 2009 in light of the fundamental changes to the paging industry that are well known to the Commission.

²³ For example, one of USAC's principal objections to the survey results was that "customers would not have had adequate time . . . to research that portion of their paging traffic which may actually be interstate." Of course, USAC's criticism steadfastly ignores that there *are no records* for the customers to research, which was the reason for the survey in the first place.

²⁴ [REDACTED]

²⁵ See, e.g., 5 U.S.C. §706.

Conclusion

For the reasons stated above, USAC's findings and conclusions in its Audit No. CR2011CP008 should be reversed and set aside, to the extent they disallow NEP's allocation of [REDACTED] to the interstate jurisdiction and require any contribution to the USF by NEP for calendar year 2009.

Respectfully submitted,

CRITICAL ALERT SYSTEMS, LLC

By: s/Kenneth E. Hardman
Kenneth E. Hardman

Its Attorney

2154 Wisconsin Avenue, NW, Suite 250
Washington, DC 20007
Direct Dial: (202) 223-3772
Facsimile: (202) 315-3587
kenhardman.law@gmail.com

June 27, 2012

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

EXHIBIT NO. 1

(USAC Final Audit Report and Transmittal Letter)

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

EXHIBIT NO. 2

(USAC Request to Modify Form 499-A Report)

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

EXHIBIT NO. 3

**(CAS Information Transmittal to USAC and Item 13
Supplemental Information)**

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

EXHIBIT NO. 4

(CAS Supplementary Responses to USAC)

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

EXHIBIT NO. 5

(Email Message Exchange Between CAS and USAC)

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

EXHIBIT NO. 6

(CAS Survey Tabulated Results)

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

[R E D A C T E D]

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of

Request for Review by CRITICAL ALERT
SYSTEMS, LLC f/k/a NEP, LLC of Decision of
Universal Service Administrator

WC Docket No. 06-122
CC Docket No. 96-45
CC Docket No. 97-21

To: The Secretary, Federal Communications Commission

Attn: Wireline Competition Bureau

DECLARATION OF TED McNAUGHT

TED McNAUGHT hereby states as follows:

I am the Chief Operating Officer of Critical Alert Systems, LLC (CAS) and have held that position since it acquired the business and assets of NEP, LLC in July 2010. Prior to the acquisition by CAS, I was President and Chief Executive Officer of NEP, LLC, a position I held since the company was formed in 1999; and I was also President of Northeast Paging, the predecessor company to NEP, LLC.

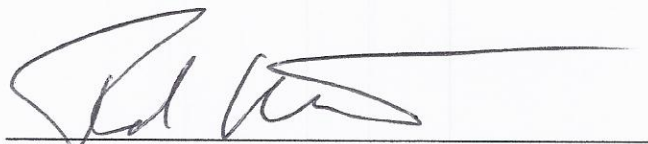
I am also the current President of the Critical Messaging Association (formerly known as the American Association of Paging Carriers), the national trade association representing the critical messaging industry; and I was the founding President of the American Association of Paging Carriers in 2002 and served as its President during its early years. I have been a close observer of the critical messaging/paging industry for more than 20 years, during which time I have always held key executive positions in companies providing critical messaging and other paging services to the public.

The statements of fact contained in the foregoing Appeal are true and correct of my own personal knowledge, both as to Critical Alert Systems, LLC and its predecessor-in-interest, NEP, LLC, except as to statements of fact as to which official notice may be taken, as to which I believe them to be true.

I would like to emphasize two points in particular. First, USAC's requirement that "actual usage data" be used to support CAS/NEP's jurisdictional allocation is impossible to comply with, in the case of the one-way services provided by CAS and NEP, LLC before it. No matter how much the USAC representatives said they understood this point, the fact is that USAC kept circling back and insisting that only "actual usage data" could justify not using the 12% "safe harbor" allocation.

Second, the paging industry that existed in 1997, on which the 12% "safe harbor" was based, was very, very different than the critical messaging/paging industry that remains today. For all practical purposes there no longer is any interstate "roaming" service provided by critical messaging or other paging carriers today, unlike the services provided by the large carriers in the industry in 1997. That "roaming" function has been taken over exclusively by the cellular/PCS industry. As a result, whatever validity the 12% "safe harbor" had when it was adopted in 1998, it no longer has any reasonable factual foundation as applied to CAS' operations today or to NEP, LLC's operation during 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of June, 2012.



Ted McNaught

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of

Request for Review by CRITICAL ALERT
SYSTEMS, LLC f/k/a NEP, LLC of Decision of
Universal Service Administrator

)
)
)
) WC Docket No. 06-122
) CC Docket No. 96-45
) CC Docket No. 97-21
)

To: The Secretary, Federal Communications Commission

Attn: Wireline Competition Bureau

DECLARATION OF LYNNE HALEY

LYNNE HALEY hereby states as follows:

I am the Director of Information Technology for Critical Alert Systems, LLC (CAS), and have held this position since it acquired the business and assets of NEP, LLC in 2010. Prior to the acquisition by CAS, I held the same position in NEP, LLC.

As a result of the site visit to CAS by the USAC audit team, I was directed by the Chief Operating Officer of CAS to conduct a representative survey of CAS' customers to determine the extent to which the messages they originate terminate in the same state (intrastate), or in a different state (interstate). I was instructed to make the survey representative of CAS' and NEP's customers, and that is what I did to the best of my ability and the time available.


Knowing that customers did not and could not have records reflecting "actual usage data," I determined that the most accurate information available could be compiled by polling customer representatives with knowledge of how the services in question are used. Had USAC afforded more time for us to conduct the survey, I could have made it a more elaborate

PUBLIC COPY - REDACTED

CONFIDENTIAL PER 47 C.F.R. §0.457(d)

undertaking; but I do not believe that affected the results. I believe instead that the survey results given to USAC accurately reflect customer usage within the limits of what it is reasonably possible for them to determine.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of June, 2012.


Lynne/Haley

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
)	
Request for Review by CRITICAL ALERT)	WC Docket No. 06-122
SYSTEMS, LLC f/k/a NEP, LLC of Decision of)	CC Docket No. 96-45
Universal Service Administrator)	CC Docket No. 97-21
)	

To: The Secretary, Federal Communications Commission

Attn: Wireline Competition Bureau

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Appeal From USAC's Findings and Conclusions upon the Universal Service Administrative Company by mailing a true copy thereof, Priority Mail postage prepaid, to the Universal Service Administrative Company, Attn: General Counsel, 2000 L Street, NW, Suite 200, Washington, DC 20036.

Dated at Washington, DC, this 27th day of June, 2012.

s/Kenneth E. Hardman
Kenneth E. Hardman